Supreme Court, U.S.
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No. _____

In The

SUPREME COURT OF THE UNITED STATES

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY BURKE,

Petitioner.

On Petition For A Writ Of Certiorari To The Washington Supreme Court

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May law enforcement delay seeking a warrant to search the defendant's person based on an *unreasonable* belief that probable case was lacking, and later execute a warrantless search under a claim of stale exigent circumstances attributable solely to the officer's original delay?

2. Which is the correct test for a warrantless search based upon an officer-cause exigency: (1) whether there was any reasonable alternative at the time of the search or (2) whether the officer's delay which caused the exigency was objectively reasonable?

3. May the trial court deny confrontation because the Defendant's theory of relevancy offended the court's modern sensibility about single-mothers and was — for that reason — deemed irrelevant.

4. In a child rape prosecution in which the child is determined to be unavailable as a witness, does the Defendant have the right to confront a prosecution witness — the child's mother — with proofs that she wished to terminate her relationship with the defendant, that she knew a fresh claim of child sexual abuse would remove the defendant from his home, and that she stole cash and credit cards from the defendant immediately after his arrest?

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PETITION FOR A WRIT OF CERTIORARI

The petitioner Jeffrey Burke respectfully prays that a writ of *certiorari* issue to review the judgment of the Supreme Court of the State of Washington memorandum decision (denying review) and the Court of Appeals of the State Washington (opinion affirming conviction).

OPINIONS BELOW

The decision of the Court of Appeals and the Supreme Court for the State of Washington are unreported and are reprinted in the Appendix, page A-1

JURISDICTIONAL STATEMENT

Jurisdiction to hear this petition for certiorari arises from the Washington State Supreme Court's order denying review of that State's intermediate court of appeals. The Supreme Court's memorandum was filed on June 4, 2002; the appellate court's original memorandum decision was filed on October 23, 2001.

The decision is reviewable under 28 U.S.C. Section 1257. The filing is timely pursuant to 28 U.S.C. Section 2101(c) and Supreme Court Rule 29.2.

CONSTITUTIONAL PROVISIONS

UNITED STATES CONSTITUTION

Fourth Amendment (reasonable search)

Fifth Amendment (due process)

Sixth Amendment (confrontation)

STATEMENT OF THE CASE

Petitioner Jeffrey Burke was charged with one count each of Child Rape and Intimidating a Public Servant. Burke sought to exclude hearsay evidence of the child, to suppress findings of a DNA sample taken from his penis and abdomen without a warrant, and to present evidence (a) that the child's mother was herself a victim of child abuse and (b) that the mother stole cash, checks, and credit cards from the defendant immediately following his arrest. The trial court denied Burke's motions and excluded all testimony regarding the mother's previous experience as well as evidence of her theft of Burke's money following his arrest.

The jury returned guilty verdicts on both counts. The State recommended 136 months, a sentence within the State's standard range. The trial court, however, ordered an exceptional sentence *sua sponte* imposing twice the range.

REASONS FOR GRANTING THE WRIT

Summary of Issues 1 and 2. The decision below permits a warrantless search based upon an "exigency" created by an arresting officer's unreasonable delay in seeking prior judicial approval.

Having interposed delay in obtaining a warrant due to an objectively unreasonable belief that probable cause was lacking, the police should not then be permitted to claim that the delay-created exigent circumstances permitted a warrantless search. In such circumstances, the resulting search is unreasonable and conflicts with authorities set forth by this Court and numerous Circuit courts. *Roaden v. Kentucky*, 93 S.Ct 2796, 2802 (1973); e.g., *United States v. Patino*, 830 F.2d 1413, 1415 (7th Cir. 1987).

Summary of Issues 3 and 4. The State's chief witness lived in the Defendant's home. She had specific experience and knowledge regarding the arrest and detention of suspects accused of child molestation. This same witness stole defendant's cash and property immediately following her report to the police in which she accused him of child rape. Nevertheless, the court below determined that the Defendant was not permitted to cross examine the witness about her past experience nor her contemporaneous theft of the Defendant's property.

Denial of confrontation in these circumstances conflicts with this Court's settled holdings, beginning

with *Pointer v. Texas*, 380 U.S. 400 (1965) and well established from *Davis v. Alaska*, 415 U.S. 308 (1974) onward. The Circuits have produce nearly uniform decisions with respect to a defendant's right to examine a witness's motive to lie, "including her possible self-interest and bias or prejudice against the defendant." *E.g., Henry v. Speckard*, 22 F.3d 1209, 1214 (2nd Cir. 1994).

I. PERMITTING LAW ENFORCEMENT TO USE EXIGENCY CREATED BY OFFICER'S UNREASONABLE DELAY AS BASIS FOR WARRANTLESS SEARCH CONFLICTS WITH THIS COURT'S PROHIBITION AGAINST UNREASONABLE INVESTIGATIVE SEARCHES

Argument. It is axiomatic that law enforcement may not create an exigency to relieve itself of the requirement to obtain a warrant or conduct a search in a reasonable manner. The court below erred in modifying this test to allow for the subjective good faith of the officer. The subjective intent of the officer is irrelevant in situations where the officer's belief is itself unreasonable. Only an *objectively* reasonable belief that an exigency exists excuses the officer from obtaining a warrant. *United States v. Patino*, 830 F.2d 1413, 1415 (7th Cir. 1987). That belief was absent here.

The court below acknowledged that a police officer may not create an exigent situation and then rely upon that exigency in order to avoid the warrant

clause. Appendix A-5 to A-7. The court held, however, that absent evidence of bad faith a police-created delay is reasonable. Appendix A-7.

The police explanation for the exigency justifying a warrantless search of Burke was entirely within law enforcement's control. While the investigating detective alleged at trial that he did not have probable cause to arrest Burke until after he personally interviewed the child, the defendant was in custody from the point he initially encountered the responding officer outside his residence. *Burke was first held at curbside by one patrol officer while the child and mother were questioned by another officer, and then transported to jail where he was stripped, handcuffed to a wall, and surveilled closely while a detective conducted yet another interview of the child.* According to the detective, he did not have probable cause even to arrest Burke much less obtain a warrant for DNA swabs until *after* the second interview. Nevertheless, the defendant clearly was subjected to a custodial arrest at least from the time of his transportation, if not before. Plainly stated, if there was probable cause to arrest the defendant on a fresh claim of rape, chain him to a wall and strip him naked, there surely was probable cause to obtain evidence of the alleged rape. The officer's "good faith" statement that he lacked probable cause cannot be credited with legal significance.

The proper test in any instance where the warrant clause is obviated is whether the resulting search was

reasonable. "Whether the basis for such authority exists is the sort of recurring factual question to which law enforcement officials must be expected to apply their judgment; and all the Fourth Amendment requires is that they answer it reasonably." *Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990). Initially the court below acknowledged this standard, Appendix A-5 to A-6, but stated that the determination of whether a "true exigency existed, a court should consider alternatives that were available to the officers *at the time of the search.*" Appendix A-5 (emphasis added). The lower court's citation to State precedent is of no avail: in one, the officer was confronted with noises emanating from the basement of a house while he was investigating a claim of rape. The officer reasonably believed that the suspect was downstairs eliminating evidence, and the appellate court permitted his impromptu search of the basement. There was no officer-created delay confronting the court and, understandably, the test for exigency did not reference such circumstances.

By limiting its review of "true exigency" to the inapposite State test for "alternatives at the time of the warrantless search," the State court has created a test that inherently strips the analysis of meaning in instances where the defendant alleges that there was an unreasonable delay. *The issue is not whether there were alternatives at the time of the search, but whether the search was unreasonably delayed until no alternatives remained.*

On the issue of delay, the state court held that absent an "apparent motive to delay seeking a warrant," or evidence that law enforcement "deliberately created the circumstances leading to the search" there is no violation. This is not the proper test.

The rule that police may not create the exigency does not turn upon a showing that the officers acted in deliberate bad faith. It is enough if the officer's delay was unreasonable. As an exception to the Fourth Amendment's warrant requirement, the burden is on the government to show that the warrantless entry is justified by exigent circumstances, and "an *objective* standard governs the reasonableness of law enforcement officials' belief that exigent circumstances have arisen." *United States v. Patino*, 830 F.2d 1413, 1415 (7th Cir. 1987) (emphasis added). Subjective good faith will not save an objectively unreasonable belief. For example, in *State v. Fondren,* (Or.App. 1979) the court rejected the state's subjective good faith reliance upon exigent circumstances:

> In this case, at least four hours before the defendant was due to finish his shift and go to his car, *the officer had all the information he needed to establish probable cause to secure a warrant from a magistrate. He had the same information he stated in his affidavit prepared the next day.* The officer testified four hours was the maximum time needed to secure a warrant. There is no intimation that anyone other than the defendant

> would have had access to the car before the defendant finished his shift at midnight. The officer was not concerned with someone else gaining access to the car as he did not put the car under surveillance. That the officer waited until 10:00 p.m. or thereafter to attempt to obtain a warrant and then decided there was insufficient time does not create exigent circumstances. The officer testified that at a time which must have been around 8:00 p.m. he discussed obtaining a warrant. The officer cannot create exigent circumstances by his own inaction.

State v. Fondren, 30 Or. App. 1035, 1036-37, 591 P.2d 1374, 1376-77 (Or.App. 1979) (emphasis added).

Courts have held that a delay that arises "naturally" may give rise to an exigency permitting a warrantless search. *United States v. Socey*, 846 F.2d 1439, 1448 (D.C. Cir.) *cert. denied*, 488 U.S. 858 (1988). [Cited with approval by the lower court, Appendix. at 7]. Events outside law enforcement's control clearly could result in a "natural" delay justifying a true exigency. See e.g., *State v. Menz*, 75 Wn. App. 351 (1994) (medical emergency). The court below asserted that it was reasonable to delay obtaining a warrant until after the second interview with the child due to an existing lack of probable cause. Yet the testimony was uncontroverted: while fretting over a claimed lack of probable cause on a fresh accusation of child rape, the detective

nonetheless believed he had authority to strip Burke naked and handcuff him to the wall. Delaying the swab until a *second* interview, and *then* claiming insufficient time for a warrant, was unreasonable. After claiming a sincere — but unreasonable — subjective believe that they lack probable cause, officers should not be permitted to forestall a warrant until circumstances ripen into a exigent state. The result renders the search manifestly unreasonable due to the simple fact that the delay creating the exigency was unreasonable.

"Where there are exigent circumstances in which police action literally must be 'now or never' to preserve the evidence of the crime, it is reasonable to permit action without prior judicial evaluation," citing automobile cases. *Roaden v. Kentucky*, 93 S.Ct 2796, 2802 (1973). Nothing in this Court's ruling in Roaden, however, suggests that the rule is categorical. And nothing in this Court's jurisprudence suggests that the determination of exigency may be objectively unreasonable.

In Burke's circumstances, there was probable cause to arrest him upon the fresh complaint of the child, as reported to her mother, and upon the child's statements during her livingroom talk with the responding officer. If, in an abundance of deference, the officers could not determine at scene whether a DNA swab was needed, the need was explicitly recognized by the time Burke was stripped and handcuffed to the wall. Yet even then officers did not

seek a warrant. Rather, the detective determined that he should await the station house arrival of the child and her mother, conduct a separate interview and, then, depending upon the child's responses, determine whether there might be probable cause to obtain a swab. By that point, however, the detective felt that further delay to obtain a warrant would risk the loss of evidence.

The delay in interviewing the child was not a "natural" circumstance of the warrant process. The information from the mother coupled with the responding officer's interview with the child was sufficient to determine that a DNA swab was important. The two or more hours-long delay before a detective decided there was probable cause, but no longer any time to obtain a warrant, was entirely unreasonable.

II. DENYING DEFENDANT OPPORTUNITY TO PRESENT EVIDENCE THAT STATE'S WITNESS STOLE CASH FROM DEFENDANT IMMEDIATELY FOLLOWING DEFENDANT'S ARREST FOR ALLEGED RAPE OF WITNESS'S CHILD CONFLICTS WITH CONFRONTATION CLAUSE RULINGS

The Defendant sought to present to the jury two related facts concerning the child's mother: (1) that years before as a child, the mother had made a claim of sexual abuse against a man who was summarily removed from her life and (2) that the mother took

substantial sums of the Defendant's money and property immediately following her report to the police.

The state court branded the proffered testimony regarding the mother's experiences as an abused child as lacking foundation. According to the appellate court, the defendant *must* show that the prior report was untrue and that it was similar to the current allegation. This requirement is in direct conflict with controlling precedent. In Burke's proffered theory, the mother's prior experience is relevant for her *knowledge* of what would happen to Burke after a fresh complaint of rape *regardless* of the truth of her long-past accusation against a third party. The state courts disregarded the relevancy of the mother's knowledge and held merely that her experiences were irrelevant and any connection to her conduct in the present case was speculative.

The state court then denied Burke the right to present evidence of the mother's theft of Burke's cash, checks, and credit cards. This evidence, unlike the mother's childhood experiences, was in no manner "speculative"[1] — the proffer included cancelled checks and credit card receipts showing that

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[1] The lower court stated that "Mr. Burke's theory apparently is that the experience caused her to understand that a child's allegation could result in the removal of an abuser from the child's environment. As the trial court noted, the theory is highly speculative, particularly in light of the fact that G.V., not the mother, was Mr. Burke's primary accuser." Appendix A-25.

the child's mother paid for her ex-husband to fly to Spokane and join her the very day of the alleged rape.

According to the state court, this evidence was only "marginally related" to the mother's credibility, in part because there was no evidence of advance planning. Appendix at A-26. Regardless of the existence of evidence of advance planning, the mother's theft from Burke on the day he was arrested gave her palpable reason to see that Burke was convicted of raping her child. Whether the theft was devised in advance, or merely was an opportunity that could not be resisted, the witness had good reason to see Burke convicted as a means to protect her own interests. This evidence, showing both motive and bias, was admissible. Furthermore, should the mother deny the acts, extrinsic proof would have been admissible.

Denial of this evidence eliminated any chance of Burke presenting the true "*res gestae*" of the case to the jury. Without evidence of either the mother's past experience or, most especially, her acts in taking Burke's money after the arrest, the jury could not properly evaluate her crucial testimony.

The State court, however, held that Burke's overall claim that the mother induced her child to go along with a claim of rape in order to end the relationship "too large a *generalization* to make about the role of divorced women in society." Appendix at A-22 to A-23 (emphasis added).

There is no support for the proposition that a defendant, in order to support his theory, must prove some *generalization* about any category of people. Burke offered his theory based upon specific facts and such inferences as could be argued to the jury. The trial court abused its discretion in determining that the defense theory must satisfy the court's generalization about the role of women, divorced or otherwise. The proffered facts demonstrated that this particular witness in fact exploited Burke's arrest, summoned her ex-husband to Spokane with Burke's money, and removed Burke from his own home. What this may say about "women" is not a judicial concern. Burke's defense was not a claim about women in general — only a statement about what the witness testifying against him in fact did on the day of his arrest.[2]

The confrontation clause requires that the defendant have a meaningful opportunity to examine his accusers.

> Denial of meaningful cross examination of an "essential state witness as to relevant matters tending to establish bias or motive will violate the Sixth Amendment's right of confrontation . . . "

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[2] Burke's trial counsel plainly stated that the evidence was offered to show that the child's mother knew she had a way to make Burke "go away quick" and that she was then free to spend Burke's money to summon her ex-husband. Appendix A-20 to A-21.

Davis v. Alaska, 415 U.S. 308 (1974) (cited by the court below at Appendix A-25). It is, of course, the jury's sole perogative to judge the credibility of any witness, and the jury is entitle to have the benefit of the defense theory so that it could make an informed judgment as to the weight to give a crucial witness's testimony. *Davis v. Alaska*, 415 U.S. at 317. The State court has acknowledged *Davis*, in particular in the setting of a rape case. "In the prosecution of sex crimes, the right of cross-examination often determines the outcome. In such cases, the credibility of the accuser is of great importance, essential to prosecution and defense alike." *State v. Roberts*, 25 Wn. App. 830, 834-35 (1980). Denying Petitioner any opportunity to confront his accuser regarding her knowledge regarding the theatment of accused offenders and her simultaneous theft of Petitioner's money on the day of his arrest impermissibly curtailed his Sixth Amendment right to confrontation and the jury's entitlement to judge her credibility.

CONCLUSION

For these reasons, the petition for a writ of *certiorari* should be granted. Respectfully submitted,

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August 23, 2002

APPENDIX

The following order and opinion were duly entered in Petitioner's direct appeal.

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	NO. 71919-5
	)	
v.	)	ORDER
	)	
JEFFREY S. BURKE,	)	C/A NO. 19213-0-III
	)	

Department I of the Court considered this matter at its June 4, 2002, Motion Calendar, and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is denied. The Respondent's motion to strike reply to answer is granted.

DATED at Olympia, Washington this 4th day of June, 2002.

CHIEF JUSTICE

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON	)	
	)	**NO 19213-0-III**
Respondent,	)	
	)	**Division Three**
v.	)	**Panel Four**
	)	
JEFFREY S. BURKE,	)	**UNPUBLISHED**
	)	**OPINION**
Appellant.	)	

FILED October 23, 2001

KATO, J. -- Jeffrey S. Burke appeals his convictions for first degree rape of a child and intimidating a public servant. He contends the court erred in (1) failing to suppress evidence seized from his body without a warrant; (2) failing to order the charges be severed for trial; (3) limiting his cross examination of a prosecution witness; (4) admitting out-of-court statements by the alleged rape victim; and (5) entering an exceptional sentence. Pro se, he contends the evidence was insufficient and the prosecutor engaged in misconduct. We affirm.

Mr. Burke was charged with raping 3-year-old G.V. and with threatening a police officer. Both incidents allegedly occurred on April 2, 1999. At trial, the State presented evidence that G.V. had told her m other, Isabel V., and a police officer that Mr.

Burke had made her "lick his pee-pee." Report of Proceedings (RP) at 12, 128.

The State also presented evidence based on a forensic analysis of substances found on G.V.'s sock and Mr. Burke's penis. A State Patrol crime lab scientist testified the substance on the sock contained mixture of DNA from more than one person.[3] The scientist assumed G.V. was one of those persons. Based on analysis of Mr. Burke's DNA, the scientist testified the likelihood of Mr. Burke being the other contributor to the mixture was 150 times higher than among a random Caucasian population, 19,000 times higher than among a random African American population, and 220 times higher than among a random Hispanic population. The scientist also opined that the two persons' DNA was mixed before it was deposited on the sock.

The scientist testified that the swabs taken from Mr. Burke's penis also contained a mixture of DNA from at least two persons. Isabel V. could not have been one of those persons, but G.V. could have. The scientist testified that 1 in 20 Caucasians, 1 in 1,300 African Americans, or 1 in 29 Hispanics could have contributed to the DNA mixture.

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[3] The scientist was unable to identify the substance. He testified it could have been semen (without sperm), breast milk, or saliva.

The State also presented evidence that, while he was being taken to jail, Mr. Burke threatened to kill a patrol officer and his wife and rape his children.

A jury found Mr. Burke guilty of both counts. The State recommended a sentence within the standard range of 136 months, but the court sua sponte ordered an exceptional sentence of 280 months. Mr. Burke appeals both the convictions and the sentence.

Mr. Burke first contends the court erred in denying Mr. Burke's motion to suppress evidence seized from his body without a warrant. After a pretrial hearing, the court found[4] that Spokane police officers responded to a complaint from Isabel V. that G.V. had reported being sexually abused by Mr. Burke earlier on the morning of April 2, 1999. The officers saw Mr. Burke walking away from the home where he lived with Isabel V. Mr. Burke, who had been drinking earlier in the day, was taken into custody within two hours of her complaint. He was left in the presence of other officers while Detective Timothy Madsen interviewed G.V. at the Public Safety Building. The interview began two to three hours after the child's initial disclosure to her mother. During the interview, G.V. told the detective that "Jeff made her lick his pee-pee," and that she vomited on Mr. Burke. Clerk's Papers (CP) at 426.

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[4]Mr. Burke has not assigned error to the court's findings. They thus are verities on appeal. See *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

Before G.V.'s disclosures during this interview, Detective Madsen believed he had insufficient information to request a search warrant. However, based on information he obtained during the interview, Detective Madsen suspected that the child's DNA (in the form of saliva or vomit) might be found on Mr. Burke's penis. He was concerned that any such evidence would disappear if Mr. Burke urinated or was allowed to wipe himself. Knowing it would take two to three hours to obtain a search warrant, Detective Madsen ordered that specimens be taken from Mr. Burke's body with penile swabs. This procedure was done within four hours of the initial complaint.

Based on these findings, the court concluded that Detective Madsen acted reasonably and that the transitory nature of the potential evidence created exigent circumstances justifying the warrantless search.

The Fourth Amendment to the United States Constitution and Article I, Section 7 of the Washington Constitution protect against unreasonable searches and seizures. *See State v. Johnson*, 128 Wn.2d 431,446,451, 909 P.2d 293 (1996). Warrantless searches are per se unreasonable except in a few, established situations. *Id.* At issue in this case is the exception permitting warrantless searches when exigent circumstances threaten the destruction of evidence. *See State v. Smith*, 88 Wn.2d 127, 137-38, 559 P.2d 970, *cert. denied*, 434 U.S. 876 (1977).

Under this exception, a warrantless search may be lawful if a police officer has probable cause and there are "emergent or exigent circumstances regarding the security and acquisition of incriminating evidence."[5] *Id.* The burden of demonstrating exigent circumstances rests with the State; whether the search is justified is determined on a case-by-case basis. *State v. Patterson*, 112 Wn.2d 731, 740, 774 P.2d 10 (1989).

In determining whether a true exigency existed, a court should consider alternatives that were available to the officers at the time of the search. *State v. Welker*, 37 Wn.App. 628, 633, 683 P.2d 1110, *review denied*, 102 Wn.2d 1006 (1984). Those include guarding the evidence to prevent its destruction and obtaining a telephonic warrant. *Id.; State v. McIntyre*, 39 Wn.App. 1, 6, 691 P.2d 587 (1984), *review denied*, 103 Wn.2d 1017 (1985). A warrantless search may not be justified if the suspect or evidence is under the control of the police so that they may prevent its destruction. *State v. Hall*, 53 Wn.App.. 296, 302-04, 766 P.2d 512, *review denied*, 112 Wn.2d 1016 (1989). However, even in this circumstance a warrantless search may be reasonable if the evidence is "evanescent," and particularly if the

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[5] The exigent circumstances exception applies even when the search involves highly intrusive methods, such as collection of bodily fluids. *See Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L.Ed. 2d 908 (1966). Mr. Burke does not contend that the intrusive nature of the search alone rendered it unlawful. Nor does he contend Detective Madsen lacked probable cause to conduct the search.

subject of the search is aware he or she is suspected of a crime and retains the present ability to destroy the evidence. *Welker*, 37 Wn.App.. at 633.

Here, the record shows the officer attempted to guard Mr. Burke in such a way as to prevent destruction of the evidence. While he interviewed G.V., Detective Madsen instructed officers to watch Mr. Burke closely, he instructed them specifically that they should accompany him if he went to the bathroom.

Nevertheless, the evidence Detective Madsen sought easily could have been destroyed by brushing against clothing or other objects. It thus was inherently evanescent. Moreover, the danger of destruction of evidence was a particular concern because Mr. Burke was aware that he was suspected of raping G.V. In light of the unique circumstances, Detective Madsen's decision to proceed with the search without a warrant was reasonable.

Mr. Burke challenges this conclusion on two grounds. First, he contends the officers deliberately created the exigent circumstance.

It is true that police officers cannot deliberately create exigent circumstances to justify a warrantless entry into a private dwelling. *United States v. Webster*, 750 F.2d 307, 327 (5th Cir. 1984), *cert. denied*, 471 U.S. 1106 (1985); *United*

States v. Thompson, 700 F.2d 944, 950 (5th Cir. 1983) (and cases cited therein). However, there is a key distinction between cases "where exigent circumstances arise naturally during a delay in obtaining a warrant and those where officers have deliberately created the exigent circumstances." *Webster*, 750 F.2d at 327.

United States v. Socey, 846 F.2d 1439, 1448 (D.C. Cir.), *cert. denied,* 488 U.S. 858 (1988).

Here, there is no evidence that Detective Madsen or any other officer deliberately created the circumstances leading to the search. Nor is there any apparent motive to delay seeking a warrant to conduct the search pending Detective Madsen's interview of G.V. Indeed, the superior court specifically found that the detective cautiously believed he lacked probably cause to obtain a warrant until *after* he had interviewed the child.

Mr. Burke also contends the exigent circumstances ended before the search was conducted. He relies on testimony that he was permitted to urinate under close supervision while Detective Madsen interviewed G.V. While it is true that this act might have destroyed or otherwise affected the evidentiary value of the swabs (an argument Mr. Burke advanced at trial), it was still possible that the search would reveal incriminating evidence in the form of saliva or vomit containing G.V.'s DNA. The bathroom visit did not vitiate the exigency of the circumstances.

The court did not err in denying Mr. Burke's motion to suppress the evidence.

Mr. Burke next contends the court abused its discretion by denying his motion to sever the charges for trial. Mr. Burke moved to sever the rape and intimidation charges for separate trials. Weighing the five considerations identified in *State v. Kalakosky*, 121 Wn.2d 525, 852 P.2d 1064 (1993), the court held: (1) Mr. Burke's defenses to the two counts were not confusing or contradictory; (2) the State's evidence was strong; (3) evidence supporting each charge would be admissible in a separate trial on the other charge; (4) the court could adequately instruct jurors to consider each count separately; and (5) judicial economy favored consolidation of the charges. Specifically, in holding the intimidation evidence would be admissible in a separate rape trial, the court observed that "the evidence of the threat or alleged intimidation would be admissible in a case of sexual assault because it would tend to show guilty knowledge on the part of the person who is charged." Pretrial RP at 84. The court thus denied the motion.

CrR 4.4(b) provides that a court may sever charges for separate trials when it "determines that severance will promote a fair determination of the defendant's guilt or innocence" of each charge. A court's ruling on a motion to sever charges is reviewed for abuse of discretion. *State v. Bythrow*, 114 Wn.2d 713, 717, 790 P.2d 154 (1990). A defendant seeking severance bears the burden of

demonstrating a trial of both counts would be "manifestly prejudicial." *Id.* at 718. A defendant may be unfairly prejudiced by a single trial if he is embarrassed by presenting separate defenses or if a single trial invites the jury "to cumulate evidence to find guilt or infer a criminal disposition." *State v. Russell*, 125 Wn.2d 24, 62-63, 882 P.2d 747 (1994), *cert. denied,* 514 U.S. 1129 (1995).

The Supreme Court has identified five considerations in reviewing a trial court's denial of a motion to sever: "[1] the jury's ability to compartmentalize the evidence, [2] the strength of the State's evidence on each count, [3] the issue of cross admissibility of the various counts, [4] whether the judge instructed the jury to decide each count separately, and [5] . . . the concern for judicial economy." *Kalakosky*, 121 Wn.2d at 537.

Mr. Burke challenges the court's conclusion, related to the third consideration, that evidence supporting the two charges would be admissible in separate trials. He concedes that evidence of the alleged rape would be admissible in a trial on the intimidation charge, but he contends the evidence of intimidation would not be admissible in a separate trial on the rape charge.

Mr. Burke initially contends the intimidation evidence would be excluded in a separate trial of the rape charge under ER 403. Under this rule, relevant evidence may be excluded if its probative value is "substantially outweighed" by (among other things)

the danger of unfair prejudice. The trial court has broad descretion in admitting or excluding evidence under ER 403. *State v. Vreen*, 143 Wn.2d 923, 932, 26 P.3d 236 (2001).

The danger of unfair prejudice here is unclear. Mr. Burke concedes the rape charge itself (and presumably the evidence supporting it) was "highly inflammatory." Brief of Appellant at 17. The intimidation evidence certainly was no more inflammatory than the rape evidence. Mr. Burke has failed to establish that a court would abuse its discretion by denying a motion to exclude the intimidation evidence pursuant to ER 403.

Mr. Burke also contends the intimidation evidence would be inadmissible under ER 404(b). The decision to admit evidence under ER 404(b) also is within a trial court's discretion. *State v. Brown*, 132 Wn.2d 529, 571-72, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998). Under ER 404(b), evidence of a defendant's other crimes is not admissible to prove his character or that he acted in conformity with that character. However, evidence of another crime may be admissible to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b). Evidence also may be admissible under ER 404(b) if it is part of the res gestae of the charged crime. *State v. Elmore,* 139 Wn.2d 250, 285, 985 P.2d 289 (1999), *cert. denied,* 531 U.S. 837 (2000).

Arguably, the act supporting the intimidation charge was part of the res gestae of the alleged rape because it "'complete[d] the story of the crime on trial by proving its immediate context of happenings near in time and place.'" *State v. Tharp*, 27 Wn.App. 198, 204, 616 P.2d 693 (1980) (quoting Edward Cleary, *McCormick's Evidence* § 190, at 448 (2d ed. 1972)), *aff'd*, 96 Wn.2d 591, 637 P.2d 961 (1981); *see State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995). Because the alleged intimidation was near in time and place to the alleged rape, the evidence may have been admitted on this basis.

Moreover, as the trial court noted, the intimidation evidence was relevant to prove Mr. Burke's "guilty knowledge." Pretrial RP at 84. This is not proof of a specific mens rea for the crime of first degree rape of a child, which Mr. Burke contends does not require any particular state of mind. *See* RCW 9.44.073. Rather, it is evidence of Mr. Burke's consciousness and acknowledgment of the alleged prior act. *See State v. Sanders*, 66 Wn.App. 878, 885-86, 833 P.2d 452 (1992), *review denied*, 120 Wn.2d 1027 (1993). The evidence thus may have been admissible on this basis.

Finally, even if evidence of one crime would not have been admissible in a separate trial on another charge, reversal is not required unless the defendant can establish specific prejudice. *Bythrow*, 114 Wn.2d at 720. Here, the court properly instructed jurors to decide each count separately. Even if the intimidation

evidence would have been inadmissible in a separate trial on the rape charge, and even if (as Mr. Burke contends) the court's ruling was an invitation for the prosecutor to use the inadmissible intimidation evidence as proof of his guilt on the rape charge, the prosecutor did not do so. She mentioned the intimidation facts only in reference to the intimidation charge. Mr. Burke has not established the specific prejudice required for reversal.

Mr. Burke next contends the court erred in admitting G.V.'s out-of-court statements to two police officers. After a pretrial hearing during which the child was unable to identify Mr. Burke or otherwise testify meaningfully, the trial court held she was not competent to testify at trial. The question thus was whether the child's out-of-court statements to her mother and two police officers were admissible.

At issue were three groups of statements: The first was G.V.'s statement to her mother, just after the incident, that Mr. Burke had made her "lick his pee-pee." RP at 12. Mr. Burke concedes the court properly admitted this statement under the excited utterance exception to the hearsay rule. *See* ER 803(a)(2). The second was the child's statement to Officer Mark Howard that she had vomited on Mr. Burke, which the trial court held also as admissible under the excited utterance exception. The third was her statements during Detective Madsen's interview that Mr. Burke had made her "lick his pee-pee." RP

at 12. The trial court held these statements were admissible under RCW 9A.44.120.

We first address the trial court's admission of G.V.'s statement to Officer Howard that she had "thrown up" on Mr. Burke. Officer Howard testified during the pretrial hearing that he spoke with the child for 20 to 30 minutes, beginning when he first arrived at the scene at 11:39 a.m.[6] The officer testified G.V. told him the house was "a mess," which was true, and told him about her toys. Pretrial RP at 156. He testified he found the child to be "a very bright little girl and that she was very cognizant of what was going on around her." Pretrial RP at 158.

The hearsay rule generally excludes an out-of-court statement offered to prove the truth of the matter asserted. ER 801(c); ER 802. However, such a statement may be admitted if it "relate[s] to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." ER 803(a)(2). An excited utterance is a spontaneous statement made while the declarant is still under the influence of a physical shock, before he or she has had "time to calm down enough to make a calculated statement based on self interest." *State v. Hardy*, 133 Wn.2d 701, 714, 946 P.2d 1175 (1997). There are three elements: (1) there must have been a startling event; (2) when

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[6] The child's mother earlier had testified that she had arrived at the home at 10 to 10:15 a.m., when she heard G.V. crying and first learned of the child's accusations against Mr. Burke.

making the statement, the declarant must have been under the influence of the startling event; and (3) the statement must relate to the startling event. *Id.* (citing *State v. Chapin*, 118 Wn.2d 681, 686, 826 P.2d 194 (1992)). A court's admission of a statement under this exception is reviewed for abuse of discretion. *State v. Strauss*, 119 Wn.2d 401, 417, 832 P.2d 78 (1992).

The first and third elements appear to be met here: G.V. allegedly was raped and the statement apparently related toe the rape. The question is whether, pursuant to element (2), the child was still under the influence of the alleged event. This is a factual inquiry. *Hardy*, 133 Wn.2d at 714. The trial court must examine the circumstances surrounding the statement to determine whether the utterance was a spontaneous and sincere response to actual sensations rather than an expression based on reflection or fabrication. *Strauss*, 119 Wn.2d at 416; *Chapin*, 118 Wn.2d at 686.

While the passage of time between the startling event and the statement is one factor to consider, it is not dispositive. *Strauss*, 119 Wn.2d at 416-17. Even statements after extended intervals will be considered spontaneous as long as they were made under continuing stress. *See, e.g., id.* (statement made over three hours after sexual assault); *State v. Thomas*, 46 Wn.App.. 280, 284, 730 P.2d 117 (1986) (statement made six to seven hours after rape), *aff'd*, 110 Wn.2d 859, 757 P.2d 512 (1988); *State v. Flett*, 40 Wn.App.

277, 287, 699 P.2d 774 (1985) (statement made seven hours after rape). However, regardless of the time elapsed, the statement is not an excited utterance if the declarant has had the opportunity to calm down and reflect about the event. *See Brown v. Spokane County Fire Prot. Dist. 1*, 100 Wn.2d 188, 195-96, 668 P.2d 571 (1983) (only 30 to 40 minutes elapsed).

Here, Officer Howard had what appears to be a rational and normal conversation with G.V.; there is no evidence suggesting the child was still under the influence of the alleged rape. In the absence of any such evidence, the court erred in admitting it as an excited utterance.

Nevertheless, a trial court's decision may be affirmed on any ground supported by the record, even one upon which it did not rely. *See State v. Norlin*, 134 Wn.2d 570, 582, 951 P.2d 1131 (1998). The State contends G.V.'s statements to both Officer Howard and Detective Madsen were admissible under RCW 9A.44.020. We now address this statute's application to both statements.

An out-of-court statement by a victim of alleged child abuse younger than age 10 is admissible in a criminal proceeding if "[t]he court finds . . . that the time, content, and circumstances of the statement provide sufficient indicia of reliability." RCW 9A.44.120(1). In addition, if the victim does not testify at trial, the statement may be admitted only if there is "corroborative evidence" of the crime. *Id.* The trial court's determination of reliability under

RCW 9A.44.120 is subject to review for abuse of discretion. *State v. Pham*, 75 Wn.App.. 626, 631, 879 P.2d 321 (1994), *review denied*, 126 Wn.2d 1002 (1995). In determining reliability, the trial court should examine:

> "(1) whether there is an apparent motive to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; and (5) the timing of the declaration and the relationship between the declarant and the witness."

State v. Ryan, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984) (quoting *State v. Parris*, 98 Wn.2d 140, 146, 654 P.2d 77 (1982)). The court also should consider whether:

> [6] the statement contains no express assertion about past fact, [7] cross examination could not show the declarant's lack of knowledge, [8] the possibility of the declarant's faulty recollection is remote, and [9] the circumstances surrounding the statement . . . are such that there is no reason to suppose the declarant misrepresented defendant's involvement.

Ryan, 103 Wn.2d at 176 (citing *Dutton v. Evans*, 400 U.S. 74, 88-89, 91 S.Ct. 210, 27 L.Ed. 2d 213 (1970)). The final four factors "are not very helpful in assessing the reliability of child hearsay statements in most sexual abuse cases." *State v. Henderson*, 48

Wn.App.. 543, 551 n.5, 740 P.2d 329, *review denied*, 109 Wn.2d 1008 (1987); *see State v. Karpenski*, 94 Wn.App. 80, 111 n.131, 971 P.2d 553 (1999). Also, it is not necessary that every factor be satisfied; a court properly exercises its discretion if the factors are "substantially met." *State v. Swan*, 114 Wn.2d 613, 652, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991).

Mr. Burke first contends there was no "corroborative evidence" as required for admission of statements when the child does not testify at trial. RCW 9A.44.120(2)(b). He is clearly wrong. G.V.'s statements are corroborated by (1) her statement to her mother (which he concedes is admissible as an excited utterance); and (2) the forensic analysis of the substances found on the child's sock and on Mr. Burke's penis. While this evidence is not overwhelming, it is corroborative and satisfies the statutory requirement.

Mr. Burke next challenges the trial court's analysis of some of the *Ryan* factors. Because none is determinative, we will discuss all nine factors.

Motive to lie. Mr. Burke relies on various evidence suggesting the child's mother, Isabel V., had a motive to lie. (This evidence related to Mr. Burke's defense that the mother fabricated the allegation to extricate herself form a failing relationship with Mr. Burke; the court excluded much of this evidence from trial, as we will discus *infra*.) Obviously, this evidence does not directly address G.V.'s motive to lie. While

one may reasonably assume the mother had the ability to influence her child's statements, there is no specific evidence in the record suggesting the child was under any such influence when making the statements to the police officers. At best, this factor neither favors nor disfavors admission.

G.V.'s general character. Isabel V. testified her daughter was "not really a liar," did not live in a fantasy world, and usually did not exaggerate events. Pretrial RP at 137-38. Mr. Burke did not offer any evidence to rebut this evidence. This factor favors admission.

Whether more than one person heard the statements. Officer Howard was the only person who testified to G.V.'s statement that she had vomited on Mr. Burke. No other person was present during Detective Madsen's interview with the child. This factor disfavors admission.

Whether statements were spontaneous. Officer Howard testified G.V. made her statement during a conversation about toys. This statement appears to have been spontaneous. G.V.'s statements to Detective Madsen were made during a formal interview at the Public Safety Building. While the statements were not uninvited, the evidence indicates the detective did not coax the allegations from G.V. He testified:

> I showed her this body map. I asked if she knew what the picture was of, and she identified the

> picture as a boy. Again, I started from the head. I pointed this time starting with the eye, and she identified the eye as an eye. I pointed at the ear, which she identified as an ear. I pointed at the mouth, which she identified as a mouth. I pointed at one of the hands, and she indicated that as a hand. I pointed at the bellybutton, and she identified it as the bellybutton. I pointed at the male genitalia area, and her exact wording was, "pee-pee," and then she said "[H]e was making me lick." Then I pointed at the leg, and she identified it as the leg.

Pretrial RP at 188-89. The evidence thus shows that the statements were spontaneous in the sense that they were not the result of coaxing or leading questions. This factor favors admission.

Timing of statements and the relationship between G.V. and the officers. Both officers apparently were strangers to the child. Also, the statements were within the first few hours after the alleged rape and thus were within the period during which a child normally would be able to recall. This factor favors admission.

Assertion about a past fact. The child's statements clearly related to past facts. This factor disfavors admission, although the usefulness of that conclusion is questionable. As many courts have noted, most statements offered for admission under RCW 9A.44.120 are assertions about past facts. *See Karpenski*, 94 Wn.App. at 110 n.125 (citing *State v.*

Leavitt, 111 Wn.2d 66, 75, 758 P.2d 982 (1988); *In re Dependency of S.S.*, 61 Wn.App. 488, 498, 814 P.2d 204, *review denied*, 117 Wn.2d 1011 (1991); *State v. Stange*, 53 Wn.App. 638, 644-47, 769 P.2d 873, *review denied*, 113 Wn.2d 1007 (1989)).

Whether cross examination could not show G.V.'s lack of knowledge. The trial court concluded the child was not competent to testify at trial, and Mr. Burke has not assigned error to this conclusion.[7] Under the circumstances, G.V. was not available for any cross examination, and this factor neither favors nor disfavors admission.

Possibility of G.V.'s faulty recollection. The record does not provide any basis for concluding the child was unable to recall the details of the alleged rape at the time of her statements. This factor favors admission.

Circumstances surrounding the statements. Mr. Burke again relies on evidence supporting his defense that her mother fabricated the allegation. Assuming this evidence could logically and reasonably lead to a finding that she had induced her daughter to make the allegation, this circumstance obviously would provide a reason to question the reliability of

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[7] Mr. Burke argues in his reply brief that the court improperly concluded G.V. was incompetent to testify at trial. However, he has not assigned error to the court's conclusion, nor has he provided any legal citation in support of his argument. We thus do not consider it. *See* RAP 10.3(a); *State v. Olson*, 126 Wn.2d 315, 320-21, 893 P.2d 629 (1995).

the child's statements. This factor arguably disfavors admission.

In conclusion, while some of the *Ryan* factors were inconclusive or disfavored admission of G.V.'s hearsay statements, other factors favored admission. No single factor is decisive, *Swan*, 114 Wn.2d at 652, and the court here carefully considered them. Mr. Burke has failed to demonstrate the court abused its discretion in admitting the statements.

Mr. Burke next contends the trial court violated his right of confrontation by excluding evidence of the mother's childhood sexual abuse and her conduct after the alleged rape. Before trial, the State moved to suppress evidence related to the prior experiences of G.V.'s mother. Mr. Burke offered to prove the following:

-- Isabel V. had only recently been divorced from G.V.'s father in Colorado. She had had "a very short . . . romance" with Mr. Burke, which had begun in an internet "chat room" just he previous October, and she had begun living with him the next month. Pretrial RP at 282.

-- Isabel V. had been molested at the age of 5 by her stepfather, who later was convicted. She also had undergone "some type of counseling." Pretrial RP at 283.

-- On the day of the alleged rape, Isabel V. removed thousands of dollars from Mr. Burke's bank

account. Using Mr. Burke's credit card, she also flew her former husband to Spokane from Colorado, and together they packed Isabel V.'s possessions into a U-Haul and moved to California.

Defense counsel agreed with the court's characterization that Mr. Burke's defense was that the rape did not happen and Isabel V. "made up" the allegation to extricate herself from their relationship. Pretrial RP at 284-85.

The court asked for "empirical scientific evidence, solid psychological type of research studies that indicate that people who have been sexually abused as children will make up and implant those kinds of beliefs in their children." Pretrial RP at 287. Defense counsel was unable to provide any such evidence, and the court declined counsel's offer to provide more research on the issue.

The Court then stated:

> Well, doesn't it almost kind of harken back to kind of a 19th century perception of woman as kind of these childlike creatures who are mentally unstable, who don't have minds of their own, who are inherently unstable, who are emotional, hysterical people who do things like that? Isn't that kind of a sexist view of women?

Pretrial RP at 288. Defense counsel responded:

I am not trying to embarrass [Isabel V.]. That is not the purpose of what I would do. I would not want to do that. That would be ridiculous for me to do that in front of twelve people. I certainly don't want to embarrass her daughter.

But I think it is important to show that perhaps there was a motive or some underlying prior experience with the subject which would either make her over sensitive to or make her realize that if the same allegation was brought against Mr. Burke, he is going to go away and he is going to go away quick. That is going to allow her to fly her ex-husband up the very same day on Mr. Burke's tab.

. . . .

I don't think there is a rule that keeps that out and/or a rule that says I cannot bring up the woman's past that says that she had a motive. She has everything [:] a method, a motive, an opportunity. And she did. She acted, for whatever reason. She acted. We think that will bring reasonable doubt into the jury's mind.

Pretrial RP at 293-96.

The court held that the mother's marital history and the origin and nature of her relationship with Mr. Burke would be admissible as part of the "normal laying out of the background of these people." Pretrial RP at 321.

With respect to evidence related to Isabel V.'s alleged sexual abuse as a child, the court held there was no basis for concluding "people who have been sexually abused are more likely to create situations in their own children in which those own children are encouraged to make false accusations of sexual abuse against others." Pretrial RP at 323. The court held the defense theory was "highly, highly, highly, theoretical and speculative, . . . not based on any empirical evidence," and "fraught with an inherent atmosphere of sexism." Pretrial RP at 323. The court also noted that the theory was not credible because the period between Isabel V.'s and the first officer's arrival at the home was "so tight and so short as to really, I think, really put this type of a theory in the nature of total speculation." Pretrial RP at 326.

With respect to evidence of Isabel V.'s acts after the alleged rape, the court held:

> [T]he problem with the defense theory, and it's not a consistent theory, is that it is argued, on the one hand, that this was not a pre-arranged plan, that this simply was a matter of opportunity that [Isabel V.] took Mr. Burke's money, as opposed to a pre-arranged scheme.
>
> Let's take the first instance. If it is, in fact, a crime of opportunity or an instance of opportunity, then what relevance does it bear to the accusation that [G.V.] made against Mr. Burke? The only way that the monetary issue becomes any kind of

a proper motive argument to be presented is if there is evidence that [Isabel V.] had pre-arranged this situation ahead of time. Further, as it appears to be argued here, the money was not used necessarily on frivolities. It is used, as I understand it, to leave town and, at one point, to bring up [Isabel V.'s] ex-husband.

It doesn't make sense to the Court to say that [the mother] has pre-arranged a situation with [G.V.'s] assistance to falsely accuse Mr. Burke in order to create a situation where they would have to suddenly leave. That . . . doesn't make sense to this Court. There is no evidence that there was any pre-arranged spending of money on [Isabel V.'s] part, that there was somehow something to be gained ahead of time by creating the scheme.

There is simply no real evidence before the Court that [Isabel V.] couldn't have left the relationship on her own. It is, again, a supposition that divorced women with children have no resources and are inherently trapped in [the] relationship. I think that is way too large a generalization to make about the role of divorced women in society.

There is further evidence that [the mother] had no particular apparent plans to leave. She is enrolled in school at the point. It is not as if she was in a situation where she is apparently getting ready to leave at the first possible moment. Everything here seems to e one in which the

monetary dispute between [Isabel V.] and Mr. Burke arises after the fact of the accusation. Issues and things that arise after the fact of the accusation, I think, are clearly irrelevant in this context.

At most, what we have is a dispute between [Isabel V.] and Mr. Burke and his family over the disposition of the funds. I think to inject that into this case would not only be irrelevant but I think would essentially place a dispute over what is either a civil dispute or some sort of a theft situation or unauthorized issuance of bank checks or fraud or forgery or something like that into this trial, which I think is, clearly, impermissible under Rule 403.

Over and above that, the essential credibility here that is at stake in this case is not the credibility of [Isabel V.]. It is the credibility of [G.V.]. There is no suggestion that somehow [G.V.] is capable of planning a situation here where she realizes that she is going to assist her mother in some monetary gain. As I said, the credibility of Isabel [V.] is of secondary nature I this context and I think really pales in importance in a situation where the disclosure is not made to one person alone, namely [Isabel V.] but is made to at least three persons. Specifically, [Isabel V.], Officer Howard, and detective Madsen, the latter two of which have no suggestion of monetary gain

or other gain to obtain in this situation from furthering a false accusation against Mr. Burke.

Pretrial RP 326-29.

The court thus exclude evidence of Isabel V.'s childhood sexual abuse and of her conduct after the alleged rape.

The Sixth Amendment to the United Sates Constitution and Article I, Section 22 of the Washington Constitution require that a criminal defendant be given an opportunity to confront and cross examine adverse witnesses. *State v. Hudlow*, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983) (citing *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L. Ed. 2d 347 (1974); *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)). The defendant must be "permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." *Davis*, 415 U.S. at 318. When a criminal prosecution turns on the testimony of one witness, the credibility of that witness is especially critical. *State v. Roberts*, 25 Wn.App. 830, 834, 611 P.2d 1297 (1980). "In the prosecution of sex crimes, the right of cross-examination often determines the outcome. In such cases, the credibility of the accuser is of great importance, essential to prosecution and deems alike." *Id.* at 834-35.

However, a defendant's right of confrontation does not permit him to introduce irrelevant evidence.[8] *Hudlow*, 99 Wn.2d at 15. A trial court may properly limit cross examination that is argumentative, speculative, or only remotely relates to the witness's credibility. *State v. Guizzotti*, 60 Wn.App.. 289, 293, 803 P.2d 808, *review denied*, 116 Wn.2d 1026 (1991); *Roberts*, 25 Wn.App. at 834.

The State contends Isabel V.'s childhood sexual abuse and her conduct after the events at issue here are speculative and irrelevant. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." ER 401. A trial court's rulings regarding relevance are reviewed for abuse of discretion. *State v. Rivers*, 129 Wn.2d 697, 709, 921 P.2d 495 (1996).

With respect to the evidence of Isabel V.'s childhood sexual abuse, Mr. Burke's theory apparently is that the experience caused her to understand that a child' allegation could result in the removal of an abuser from the child's environment. As the trial court noted, the theory is highly speculative, particularly in light of the fact that G.V.,

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[8] In addition, a defendant's right to present even *relevant* evidence must "be counterbalanced by the state's interest in seeing that the evidence is not so prejudicial as to disrupt the fairness of the fact-finding process." *Hudlow*, 99 Wn.2d at 15. The State does not contend the evidence would have disrupted the fact fining process.

not the mother, was Mr. Burke's primary accuser. In Washington, the law requires that, before admitting prior sexual abuse as proof of a motive to fabricate, a defendant must lay a foundation by showing the witness's prior abuse report was untrue, that the prior report was similar to the witness's prior abuse report was untrue, that the prior report was similar to he current allegation, or that there was some other connection between the two events. *State v. Peterson*, 35 Wn.App. 481, 484, 667 P.2d 645, *review denied*, 100 Wn.2d 1028 (1983). Mr. Burke failed to lay such a foundation, and the court properly excluded it as irrelevant.

With respect to Isabel V.'s activities after the alleged rape, Mr. Burke's theory is that this evidence would demonstrate that her motive in pressing the allegation was to extricate herself form an unsatisfactory relationship with him and to obtain the financial resources to move herself and her children away from Spokane. However, as the trial court noted, this evidence only marginally related to Isabel V.'s credibility, particularly in light of the absence of any evidence Isabel V. planned in advance to leave the area. The trial court did not abuse its discretion in concluding the evidence was implausible and speculative.

Pro se, Mr. Burke next contends the prosecutor engaged in misconduct warranting reversal. To obtain reversal of a conviction on the basis of proseutorial misconduct, a defendant must show that

the prosecutor's conduct was improper and that the conduct had a prejudicial effect, which means there must be a substantial likelihood the conduct affected the verdict. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121 (1996). A defendant's failure to object constitutes a waiver of the error "unless the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995).

Mr. Burke contends the prosecutor engaged in misconduct in four ways:

Misstating the evidence. Mr. Burke contends the prosecutor argued during opening statement that there was strong[9] evidence of his guilt by way of DNA evidence. The parties' opening statements are not a part of the record on appeal, so it is not possible to evaluate the circumstances of the alleged statement. An opening statement should not misstate what will be contained in the evidence. *State v. Torres*, 16 Wn.App. 254, 258, 554 P.2d 1069 (1976). Although, as Mr. Burke contends, the DNA evidence was not "strong" the prosecutor's alleged statement did not seriously misstate the evidence to be presented. Mr.

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[9] Mr. Burke's pro se brief actually quotes the prosecutor as saying there was "sting evidence." Pro Se Brief of appellant at 3. However, his subsequent argument alleges the prosecutor said there was "strong" DNA evidence. Pro Se Brief of appellant at 3-4.

Burke has failed to demonstrate there was s substantial likelihood the statement affected the verdict. He thus has failed to establish prejudice, and reversal is not required on this ground.

Bribing a witness. Mr. Burke contends the State effectively bribed Isabel V. by declining the prosecute her for her conduct after the alleged rape. He contends the State's action was in return for the mother's testimony against him, which he contends was a violation of RCW 9A.72.090. The record on appeal does not suggest the existence of such an agreement. Also, a cavalcade of courts has rejected a similar argument in the federal system. *United States v. Lawery*, 166 F.3d 1119, 1123 (11th Cir.), *cert. denied*, 528 U.S. 889 (1999); *see United States v. Singleton*, 165 F.3d 1297 (10th Cir.), *cert. denied*, 527 U.S. 1024 (1999); *United States v. Hunte*, 193 F.3d 173, 174-76 (3rd Cir. 1999), *cert. denied*, 528 U.S. 1128 (2000); *United States v. Lara*, 181 F.3d 183, 197-98 (1st cir.), *cert. denied*, 528 U.S. 979 (1999); *United States v. Condon*, 170 F.3d 687, 688-89 (7th Cir.), *cert. denied*, 526 U.S. 1126 (1999); *United States v. Ramsey*, 165 F.3d 980, 986-91 (D.C. Cir.), *cert. denied*, 528 U.S. 894 (1999); *United States v. Haese*, 162 F.3d 359, 366-68 (5th Cir. 1998), *cert. denied*, 526 U.S. 1138 (1999); *United States v. Ware*, 161 F.3d 414, 418-24 (6th Cir. 1998), *cert. denied*, 526 U.S. 1045 (1999).

Permitting tampering of a witness. Mr. Burke contends the State allowed Isabel V. to tamper with a

witness in violation of RCW 9A.72.120.[10] The argument is based on G.V.'s testimony during the pretrial competency hearing:

> Q. Has your mommy talked to you about why we are here today?
>
> A. Yes.
>
> Q. What has she said?
>
> A. She said that he is a bad boy.
>
> Q. Who is a bad boy?
>
> A. Jeff.

Pretrial RP at 118. This evidence does not demonstrate that Isabel V. attempted to induce her daughter to testify falsely. Even if it did, the record does not support Mr. Burke's contention that the State sanctioned the conduct.

"Coaching" of a witness. This argument is based in part on Officer Howard's admission during cross

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[10] The statute provides in pertinent part:

"A person is guilty of tampering with a witness if he or she attempts to induce a witness or person he or she has reason to believe is about to be called as a witness in any official proceeding or a person whom he or she has reason to believe may have information relevant to a criminal investigation or the abuse or neglect of a minor child to:

"(a) Testify falsely or, without right or privilege to do so, to withhold any testimony."

examination, what some portions of his testimony were not contained in his police report of the incident:

Q. Was the TeleTubby contained anywhere in your report?

A. No, sir, it wasn't.

Q. So it was after your conversation with the prosecuting attorney[']s

office that it became aware to you that a TeleTubby was important?

A. When I found out that I was coming to court, it was important to me

to recall as many as facts as I could, yes, sir.

Q. And that was after you had spoken to the prosecutor?

A. Yes. After I found out I was coming to court.

Pretrial RP at 160.

Mr. Burke also relies on a sidebar during the mother's testimony at trial, during which defense counsel pointed out that a person working with the prosecutor was "nodding yes and nodding no. And it appears to be coaching the witness." RP at 47-48. The trial judge told the attorneys he would "keep an eye on it," and there was no further mention of the conduct. RP at 48.

Mr. Burke's argument apparently suggests these two instances also amounted to witness tampering in violation of RCW 9A.72.120. But in neither case does the record show the prosecutor (or anyone else) attempted to induce the witnesses to testify falsely. The record does not support Mr. Burke's contentions.

Mr. Burke next contends pro se that the court erred in denying his motion to dismiss at the close of the State's case in chief. After the court denied his motion to dismiss, Mr. Burke presented evidence in his own behalf. He thus waived his challenge to the court's ruling. *See State v. Allen*, 88 Wn.2d 394, 396, 562 P.2d 632 (1977); *State v. Young*, 50 Wn.App. 107, 111, 747 P.2d 486 (1987). We nevertheless will address the issue of the sufficiency of the evidence generally. In this context, a reviewing court must examine the evidence in a light most favorable to the prosecution to determine whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). It must draw all reasonable inferences in the State's favor and interpret them most strongly against the defendant. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977).

Mr. Burke points to the inconclusive forensic analysis of the physical evidence. However, G.V.'s statements to her mother and to Detective Madsen, even without the physical evidence, could have led a rational trier of fact to convict Mr. Burke. Although

the evidence is not overwhelming, it is not so insufficient as to require several.

Finally, Mr. Burke contends the court abused its discretion by ordering an exceptional sentence of 280 months. Under RCW 9.94A.210(4), there are three potential issues on review of an exceptional sentence. First, the defendant may challenge the factual basis of the court's reasons for imposing the sentence, under the "clearly erroneous" standard of review; second, the defendant may contest the legal justification of the court's reasons, which are reviewed as a "matter of law"; and third, the defendant may challenge the sentence as clearly too excessive or too lenient, which is reviewed under the "abuse of discretion" standard. *State v. Branch*, 129 Wn.2d 635, 645-46, 919 P.2d 1228 (1996); *State v. Johnson*, 124 Wn.2d 57, 65-66, 873 P.2d 514 (1994); *State v. Allert*, 117 Wn.2d 156, 163, 815 P.2d 752 (1991).

The court here identified two reasons for entering an exceptional sentence: (1) G.V.'s vulnerability; and (2) Mr. Burke's abuse of his position of trust. Mr. Burke does not argue either that these are legally invalid reasons or that the record does not support the court's findings. Rather, he contends his sentence is disproportionately longer than sentences in other cases involving what he contends are more egregious crimes. Whatever the logic of this argument, the Supreme Court has rejected just such a proportionality analysis. *State v. Ritchie*, 126 Wn.2d 388, 396-97, 894 P.2d 1308 (1995).

The convictions and sentence are affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate reports, but it will be filed for public record pursuant to RCW 2.06.040.

Kato, J.

WE CONCUR:

Sweeney, A.C.J.

Schultheis, J.